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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NO. 91-790

CSX TRANSPORTATION, INC.,
Petitioner,

vs.

Mrs. Lizzie Beatrice EASTERWOOD,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED

I. WHETHER THE COMMON-LAW RULE REQUIRING A RAILROAD TO MAINTAIN A SAFE CROSSING BY PLACING ACTIVE WARNING DEVICES IN A HAZARDOUS AREA IS PREEMPTED BY THE FEDERAL RAILROAD SAFETY ACT WHICH ONLY ALLOWS FOR RULES REGULATING THE USE OF FEDERAL MONEY?

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Respondent, Cross Petitioner.

RESPONSE TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent urges the Court to deny Petitioner, CSX's Writ of Certiorari on the issue of whether the Eleventh Circuit was correct in unholding the Railroad's common-law duty to maintain a safe crossing.

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OPINIONS BELOW

The opinion of the Court of Appeals dated June 20th, 1991 is reported at 933 F.2d 1548 and appears in the appendix of Petitioner's petition for certiorari. The opinion of the District Court dated August 8, 1990, reported at 742 F.Supp 676 is also found in the appendix of Petitioner's petition for certiorari. The Order of the Court of Appeals for the Eleventh Circuit dated August 20, 1991, denying Petitioner's petition for rehearing and suggestion for rehearing en banc appears in the appendix to Petitioner's petition for certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered June 20, 1991. A petition for rehearing filed by Petitioner herein, was denied on August 20, 1991 and Petitioner filed its Petition for Certiorari on November 15, 1991. Respondent filed this, her response within 30 days of receipt of Petitioner's Petition for Certiorari as provided for in S. Ct. R. 12.3.[1] This Court's jurisdiction is invoked under 28 U.S.C.A. Sec. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution states in Article VI, Clause 2"

> This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof . . . shall be the supreme law of the Land;

[1] The original response to the Petition was timely filed on December 16, 1991. Because Respondent was in error in filing her cross-petition with in the same document, this is being resubmitted at this time.

Section 101 of the Federal Railroad Safety Act, 45 U.S.C. Sec. 421 provides:

> The Congress declares that the purpose of this Act is to promote safety in all areas of railroad operations and to reduce railroad related accidents, and to reduce deaths and injuries to persons, and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

Section 205 of the Federal Railroad Safety Act, 45 U.S.C. Sec. 434, provides:

> The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement. A state may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Section 213.1 of the Code of Federal Regulations, 49 C.F.R. 213.1 provides:

> This part prescribes initial minimum safety requirements for railroad track that is part of the general railroad system of transportation. The requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore, a combination of track conditions, none of which individually amounts to a deviation from the requirements of this part, may require remedial action to provide for safe operations over that track.

STATEMENT OF THE CASE

A. *Procedural Background*

The underlying case is a wrongful death action for recovery of damages for the death of Thomas Ray Easterwood which occurred on February 24, 1988. The original action was filed by decedent's wife in the United States District Court for the Northern District of Georgia on June 3, 1988. The District Court's jurisdiction was invoked under diversity of citizenship.

The case was set for trial for December 30, 1989. On December 19th Petitioner, CSX, filed its motion for summary judgment contending for the first time that plaintiff's claims were preempted by the Federal Railroad Safety Act of 1970. The District Court granted CSX's motion for summary judgment on August 8, 1990 on the issues of preemption and further found that there were no material issues of fact to be determined by a jury on Plaintiff's non-preempted claims.

Mrs. Easterwood filed her Notice of Appeal to the 11th Circuit Court of Appeals on September 6, 1990. On June 20, 1991 the Court of Appeals upheld the District Court's order finding that the question of whether the defendent failed to travel at a safe and prudent speed was preempted by the Federal Railroad Safety Act and reversed the District Court on all other issues. The 11th Circuit correctly held that Mrs. Easterwood's claim that the Railroad failed to maintain a safe crossing was not preempted by the Federal Railroad Safety Act and there are numerous material issues of fact remaining which are not preempted.

Petitioner, CSX, filed its motion for rehearing and suggestion for rehearing en banc which was denied by the 11th Circuit on August 20, 1991. CSX then filed its Petition for Certiorari to this Honorable Court on November 15, 1991.

B. *Factual Background*

On the morning of February 24, 1988, Mr. Thomas Easterwood arrived at his job of nineteen years at Duncan Wholesale in Cartersville, Georgia, where he worked as a delivery truck driver. He loaded his long bed International truck with various products and left for his first delivery.

February 24th was a cold, clear winter morning when at 8:52 a.m. Mr. Easterwood came upon the Cook Street Railroad Crossing. He was driving slowly and carefully east toward the crossing at a speed of about 10 miles per hour, with the morning sun shining on his windshield. A CSX engine was running backward pulling one car along the railroad track at this same time. The train approached the Cook Street crossing at a speed of between 32 and 50 miles per hour.

Mr. Easterwood attempted to negotiate this dangerous crossing in his long bed truck apparently unaware of the oncoming train. The flashing lights and bells activated just a moment before Mr. Easterwood passed under them and he was killed by the Petitioner's train.

This railroad crossing has been the scene of at least seven prior collisions since 1981. There are numerous problems with this crossing such as a curve in the tracks just north of Cook Street which allows only 150 feet of sight distance for a motorist looking up the track. Problems exist also because of the amount of vegetation allowed to grow along the side of the track, frequently malfunctioning signals which produce false warnings, and a hump in the crossing which make the tracks difficult for drivers of large trucks to maneuver. This is a heavily traveled crossing, as it lies very close to the heart of Cartersville, Georgia, and the tracks run parallel to one of the City's busiest streets. Due to the numerous hazards at this crossing and the large number of motorists who traverse the crossing, cross-petitioner charges the railroad with negligence also, in failing to reduce its speed to a speed which is reasonable and prudent under the circumstances.

REASONS FOR DENYING PETITIONER'S WRIT

I. THE DECISION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT WHICH UPHOLDS THE COMMON-LAW RULE REQUIRING A RAILROAD TO MAINTAIN A SAFE CROSSING DOES NOT CONFLICT WITH NOR EVEN AFFECT THE FEDERAL SCHEME TO PROMOTE RAILROAD CROSSING SAFETY.

Contrary to Petitioner's contentions and statements, neither the Federal Railroad Safety Act nor any of the other acts cited by Petitioner, contain any express preemption of Mrs. Easterwood's claim for damages arising out of the Railroad's failure to install gate arms at the Cook Street Crossing. Petitioner urges this Court as it did the Court below that the Federal Railroad Safety Act preempts state common law negligence claims in almost every area. Petitioner fails to state however, exactly how the F.R.S.A. accomplishes this. The acts cited only require the Secretary of Transportation to study the grade crossing problem.

Petitioner bases its argument that the F.R.S.A. expressly preempts a common law claim for negligence on two congressional acts. It urges this court to find that the Federal Aide Highway Act and the Surface Transportation Act constitute regulations promulgated by the Secretary of Transportation and therefore according the language of the F.R.S.A., preempt the state common-law. These two acts however, address only studies and funding.

A. *The legislative history reveals that Congress's concern with railroad crossing safety is limited to studying the grade crossing problem and providing federal funds.*

Senate report 91-619 on the proposed act, originally entitled the "Railroad Safety and Research Act of 1969" emphasized that the scope of federal involvement in grade crossing safety is only to the extent of "sufficient funds" available to promulgate programs that address the hazards of grade crossings. The report characterizes the Secretary's power under this act to help eliminate hazards only to the extent of the available

federal funds. Congress then authorized the Secretary to study the grade crossing problem. Congress was extremely concerned with the grade crossing problem but more concerned with the lack of resources available to help the railroads eliminate the hazards.

> Grade crossing safety receives attention from highway authorities as well as railroad organizations. Under existing law, Federal-aid highway funds may be used on grade crossings on the Federal-aid highway system. This includes interstate, primary, and secondary roads which together account for slightly more than 20 percent of the total number of crossings. However, Federal funds may not be used to reduce hazards at railroad crossings of city streets and on many state supplementary highways and local roads which are not on the Federal-aid system and which represent the remaining 80 percent of the total. A certain number of safety improvements are being made currently by the carriers and State and local agencies on crossings not on the Federal-aid system. There is an imperative need for an expanded public program to cover these crossings in order to reduce immediately this extremely high fatality rate. Senate Report No. 91-619.

As a result of the Secretary's study, Congress amended the Highway Safety Act in 1973, at 23 U.S.C. Sec. 130 to require the states to survey all crossings and prioritize them to insure that the most dangerous crossings receive the available Federal Funds.

B. *The State's role in providing grade-crossing protection is limited to identifying those crossings which should receive federal funds and insuring that the devices qualify to receive those funds.*

Petitioner argues that because the State has a role in surveying and scheduling projects to receive federal funds and must ultimately approve active protection devices, any state common-law claim is preempted. If a common-law claim were at issue here that sought to place responsibility on the railroad for failure to survey or schedule a project to be the recipient of federal funds, Petitioner's claim might have merit. That is not the case.

Petitioner siezes on the language that the State must "approve" the upgraded warning device to justify its position that the Railroad is relieved of the responsibility of maintaining a safe crossing.

The State's only role with regard to approval however, is to decide whether the active protection device is in conformity with the Manual on Highway Traffic Control Devices. The Manual sets forth the minimum standards necessary for any traffic control device that is installed with federal money. It is important to note however, that adoption of the Manual is not required, but failing to adopt the Manual may result in a loss of federal funds. The Manual does not lessen the Railroad's responsibility. The railroad company still bears the responsibility for design, installation and maintenance.

The Manual on Uniform Traffic Control Devices is not the law, but merely the standard or the norm. It does not determine the responsibility of the Railroad. *Runkle v. Burlington Northern Railroad,* 613 P.2d 982 (Mont. 1980). The act only represents an effort by the Federal Government to improve the safety at grade crossings but does not lessen the existing duty on the railroad to maintain a good and safe crossing *Karl v. Burlington Northern Railroad Co.*, 880 F.2d 68 (8th Cir. 1989). There is no law, state or federal, which would prevent the Railroad from deciding that an active warning device is needed and paying the full cost of that device.

As the Circuit Court correctly noted, this set of regulations only allows the states to apply for Federal-aid to fund the improvements *Easterwood v. CSX Transportation Inc.*, 933 F.2d 1548 (11th Cir. 1991). The Court could find no express preemption of the grade crossing question. Neither could it find the necessary requirements to imply preemption as there is no conflict between allowing tort suits to go forward and building better railroad crossings.

As the Federal Railroad Safety Act has as its stated purpose the promotion of safety and the reduction of deaths and injuries in railroad related accidents 45 U.S.C. Sec. 421, it would be counter productive for it to supplant the most effective method the law has developed to control negligent behavior, that being the common law. Because this Court

has already decided that there should be no preemption unless congress expressly supplants the common-law and the two laws conflict, certiorari on this issue should not be granted *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78. L.Ed. 443 (1984).

C. *The decision below does not CREATE a conflict in the Circuits.*

Petitioner implies that the Decision of the Eleventh Circuit is against all authority except that of the eighth Circuit in *Karl v. Burlington Northern Railroad Co.*, 880 F.2d 68 (1989) and relies heavily on the 1983 decision in *Marshall v. Burlington Northern Railroad Co.*, 720 F.2d 1149 (9th Cir. 1983) and *Armijo v. The Atchison, Topeka & Sante Fe Railway Co.*, 754 F.Supp. 1526 (D.N.M. 1990). *Marshall* was one of the first cases to present the problem to the courts and was the very first to receive appellate review. The Court in *Marshall* held that the railroad's common-law duty to maintain a safe crossing is preempted when the State has made a decision on which warning device to use. Until the State's decision is made, the Railroad still has the responsibility. *Nixon v. Burlington Northern Railroad Co.*, No CV-85-384-BLG (1988 U.S. Dist. Lexis 16477) (D.Mont. 4/2/88) followed *Marshall* as it was the only appellate decision at the time.

It is true that several courts have followed the *Marshall* decision but several others have followed the reasoning of *Karl* cited above. Taking *Marshall* to its logical conclusion would mean that once a state determines that gate arms are needed at a hazardous crossing, the railroad could no longer be held negligent for failure to install them. What then would be the incentive for installing the device? If liability ceases once the state makes the decision, the Railroad would be immune from suit whether they actually installed the warning device or not.

The F.R.S.A. sets forth no federal remedy for a Railroad's failure to comply with a State recommendation. Neither has it been found to imply a right of action. All victims of the railroad's failure to complete the project would be left without any remedy.

The F.R.S.A. provides no federal remedy because neither Congress nor the Secretary of Transportation ever contemplated the argument now being propounded to the Courts. The 8th Circuit in *Karl v. Burlington Northern Railroad Co.*, 880 F.2d 68 (1989) apparently recognized the problems with the ruling in *Marshall*. *Karl* cited *Runkle v. Burlington Northern Railroad Co.*, 613 p.2d 982 (Mont. S.C. 1980) and held that the F.R.S.A. only represents an effort by the Federal Government to improve the safety at grade crossings but does not lessen the existing duty on the railroad to maintain a good and safe crossing. The same result was reached in *McMinn v. Consolidated Rail Corp.*, 716 F.Supp 125 (N.J. 1989) and *Carson v. Burlington Northern Railroad Co.*, No. 89-0-513 (D.C. Neb. 7/5/90). These decisions which reject the Railroad's argument are not cited by Petitioner.

Petitioner cites the case of *Armijo v. The Atchison, Topeka & Santa Fe Railway Co.*, 754 F. Supp. 1526 (D.N.M. 1990) where the District Court found that Plaintiff's claims were expressly preempted. The *Armijo* Court however noted in its decision that Plaintiff failed to dispute Defendant's undisputed material fact that the F.R.S.A. expressly preempted the State law. The Eleventh Circuit was not faced with so simple a problem. Respondent has vigorously disputed that her claims are preempted by Federal Law. The Eleventh Circuit analyzed the decisions cited by Petitioner and Respondent and chose to follow the reasoning of the Courts that have found no preemption of Respondent's common-law claims. Respondent cannot argue that there is not a conflict in the lower courts. That conflict however, was not created by the case at bar. This case helps resolve the conflict by being the third appellate decision and the one which will constitute the weight of authority. Since this issue was correctly decided by the Eleventh Circuit there is no need for Supreme Court Review at this time.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests the Court to DENY the petition with regard to the Petitioner's contention that the Railroad's duty to maintain a safe crossing is preempted.

January 24, 1992

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, James I. Parker, Counsel for Respondent, Cross Petitioner, herein and a Member of the Bar of the Supreme Court of the United States, hereby Certify that I have on this date served three true and correct copies of the foregoing Response on Counsel for Petitioner by placing same in the United States Mail with sufficient postage affixed thereto and addressed to the following:

Mr. Jack Senterfitt
Mr. Richard T. Fulton
Alston & Bird
1201 West Peachtree Street, N.W.
Atlanta, Georgia 30309-3424

I further certify that all parties required to be served, have been served.

January 24, 1992

James I. Parker
Counsel for Respondent